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IN THE

# Supreme Court of the United States

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OCTOBER TERM, 1947

No. 386

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JESSE M. CARNEY and MILTON GRADY RAMSEY,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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**Petition for Writ of Certiorari and Brief in Support Thereof.**

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## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice of the Supreme Court of the United States, Fred M. Vinson, and to the Honorable Associate Justices Thereof:*

Your petitioners, Jesse M. Carney and Milton Grady Ramsey, petition this court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of conviction as to Count Two of the Indictment, and as grounds thereof set forth as follows:

### Opinion Below.

The Opinion of the court below is not yet published. It is on page 129 of the Record.

## Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, U. S. Codes and by Title 18, Section 72, U. S. Codes. The appellants were indicted [R. 2] by the United States Grand Jury for the Southern District of California, Central Division. Judgment against them was pronounced on March 2, 1945. Notice of Appeal was duly and regularly filed and the cause was decided on August 22, 1947, reversing Count One of the indictment and affirming Count Two of the indictment [R. 29].

Petition for rehearing as to Count Two of the indictment was filed and considered, and denied September 10, 1947 [R. 146].

## Statutes Involved.

Title 18, Section 72, U. S. Codes:

> "§72. *(Criminal Code, section 28.) Making, forging, counterfeiting, or altering bonds, bids, or public records; transmitting such papers.* Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall

transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000, or imprisoned not more than ten years or both. (R. S. §§5418, 5479; Mar. 4, 1909, c. 321, §28, 35 Stat. 1094.)"

Fourth and Fifth Amendments to the Constitution of the United States.

**Amendment IV.**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

**Amendment V.**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## Questions Presented by This Appeal.

1. Whether papers and effects in a garage are covered by the provisions of the Fourth Amendment to the Constitution of the United States requiring a search warrant?

2. Whether an affidavit setting out merely that the defendants acquired property, which in and of itself was innocent in its character, was sufficient to establish reasonable and probable cause that the crime of counterfeiting was taking place and raising the question as to the sufficiency of an affidavit to show reasonable and probable cause where the affidavit is insufficient of itself to show that a crime was being committed?

3. Whether an exploratory search may be made and evidence seized and not specifically described in any affidavit or search warrant?

4. Whether the introduction in evidence of exhibits thus seized violates the defendant's rights under the Fourth and Fifth Amendment to the Constitution of the United States?

5. Whether an indictment which has been altered by the Clerk of the Court on orders of the court as to Count One of the indictment nullifies the entire indictment since the indictment was based on the same evidence furnished as to counts one and two or whether such indictment is severable as to counts one and two for the purpose of nullifying only half the indictment?

6. Whether evidence introduced as to alleged counterfeit gas ration stamps relating to a count which was quashed because the indictment was altered so far prejudices the defendant as to count two as to require a reversal of the judgment as to count one?

7. Whether mere possession of partially printed gasoline ration coupons with nothing more establishes an intent to utter and publish them as true and to defraud the United States?

8. Whether the court erred in refusing instructions of the defendants as to their theory of the case?

9. Whether a printing is a "writing" within the meaning of Title 18, Section 72 U. S. C. A.?

10. Whether the court erred in instructions given as to a printing being a "writing" and thus extending the plain language of the Statute?

## Reasons for Allowing the Writ.

I.

The questions herein involved are important in relation to the scope and effect of the Fourth Amendment to the Constitution of the United States.

The court has held that a garage is not covered by the provisions of the Fourth Amendment to the Constitution of the United States, yet the Fourth Amendment is not limited to a home or place of business, but includes all papers and effects. In this day and time, a garage is a place where one keeps many of his papers and effects.

The court's opinion is in conflict with the applicable decision on the Fourth Amendment to the Constitution of the United States and the scope which it covers, particularly *Weeks v. U. S.*, 245 U. S. 618, 62 L. Ed. 513; *U. S. v. Lefkowitz*, 285 U. S. 452, 76 L. Ed. 877; *Harris v. U. S.*, 91 L. Ed. 1020.

II.

The court erred in holding the search warrants were sufficient.

III.

This case involves, again, the important question of whether an affidavit in support of a search warrant must be sufficient to establish facts before a jury.

IV.

The case also involves the important question of whether the alteration of an indictment in Count One still permits the court to permit the indictment to stand as to the other count, where the same evidence was used to obtain the indictment on both counts.

V.

The important question is raised as to whether the court erred in holding that printings are "writings" within the meaning of the Statute making an offense to counterfeit "other writings" which are separate and apart from printings and thus extends the statutory definition of a writing.

VI.

The question is also raised by this appeal as to whether persons charged with and arrested in the act of printing are guilty of "uttering and publishing" as charged in count two of the indictment.

## VII.

The question is also raised as to the scope and extent of instructions to which a defendant is entitled presenting his theory of the case, and the question is important in this court's supervisory powers in these matters.

For each and all of these errors, the defendants pray for reversal of the judgments as to Count Two of the indictment.

Respectfully submitted,

MORRIS LAVINE,

*Attorney for Petitioners.*

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## BRIEF IN SUPPORT OF THE PETITION.

### Opinion Below.

The opinion below has not yet been published but is to be found on page 129 of the Record.

### Jurisdiction.

Jurisdictional statement in the petition is herein adopted.

### Statutes Involved.

The Statutes involve Title 18, Section 72, U. S. Codes and the Fourth and Fifth Amendments to the Constitution of the United States. These are all quoted in the Petition.

## Summary of the Argument.

SPECIFICATION OF ERRORS.

A review should be granted because:

I.

The District Court and the Circuit Court of Appeals erred in holding that a garage is not protected by the provisions of the Fourth Amendment to the Constitution of the United States.

II.

The District Court and the Circuit Court erred in holding that an affidavit should not set forth probable cause to believe that a crime was being committed, or specifying the articles to be seized was sufficient basis for a search warrant of a house.

III.

The District Court and Circuit Court erred in holding that an exploratory search could be made on the basis of a search warrant which was not founded on an affidavit setting out reasonable and probable cause and specifically describing the articles to be seized.

IV.

The District Court erred in admitting the evidence so seized to be introduced in the trial of the defendants over timely objections.

V.

The Circuit Court erred in holding that where it had found an indictment to have been altered in Count One that nevertheless Count Two could stand.

VI.

The District Court erred in holding that evidence which was quashed in relation to Count One did not prejudice the defendants as to Count Two.

VII.

The District Court erred that mere possession of gasoline ration coupons, which were being counterfeited, showed an intent to utter and publish them as true.

VIII.

The District Court erred in holding and instructing the jury that printings are "writings" within the meaning of Title 18, Section 72, U. S. Codes.

Each of these questions are important in the administration of criminal law and involve fundamental constitutional rights of the defendants.

## Argument.

This petition should be granted to settle fundamental questions of criminal law not heretofore decided by this court and also in the exercise of the supervisory powers over criminal cases.

The Circuit Court of Appeals has held that a garage is not covered by the Fourth Amendment to the Constitution of the United States. The Fourth Amendment is not limited to homes or offices but covers "the right of the people to be secure in their persons, houses, papers and effects." Such broad designation extends to a garage as well as to a house.

The Government, in this case, does not claim that the papers seized or the instruments seized belong to the Government as in *Davis v. United States,* 328 U. S. 590.

They allege that they did not belong to the Government. See also *Harris v. United States,* 91 L. Ed. 1020, and the dissenting opinions therein.

The Court also failed to distinguish in its decision the requirements of an affidavit showing probable cause. This affidavit must set forth facts sufficient to satisfy a jury.

*Grau v. U. S.,* 287 U. S. 124.

The Circuit Court also permitted the seizure of articles for evidence on the basis of a search that of itself was illegal.

The Court failed to distinguish between search and seizure, both of which are forbidden by the Fourth Amendment.

*Boyd v. U. S.,* 29 L. Ed. 752, 116 U. S. 616.

The Circuit Court erred in holding that the alteration of the indictment only nullified half of the indictment.

The Circuit Court held that Count One of the indictment was a nullity because it was altered by the trial judge, but it held that this could not affect Count Two. However, the grand jury in returning the indictment, the evidence on which Count One was based, was the basis for returning Count Two which charged "uttering and publishing with intent to defraud the United States" by the ration coupons referred to in Count One. These were designated by the Grand Jury in Count One as K-14 ration coupons. Since there were no K-14 ration coupons, it should have nullified the entire indictment, not merely half of it.

*Ex Parte Bain,* 121 U. S. 1;
*Edgerton v. U. S.,* 143 F. (2d) 697;
*Albrecht v. U. S.,* 273 U. S. 1, 8.

The third question raised by this appeal is whether the evidence is sufficient to sustain a conviction on Count Two which charges possession with the intent to utter or publish as true gasoline ration coupons, where there is no evidence of the intent to utter or publish them and the accused are arrested during the course of a printing.

However, it has been said by the Supreme Court in such a case that the case of *Mitchner v. United States,* decided by the Supreme Court in the *per curiam* opinion on June 2, 1947, on authority of *Blockberger, Albrecht* and *Gaviaras* cases, 284 U. S. 299 (*Blockberger v. U. S.,* 284 U. S. 299; *Albrecht v. U. S.,* 273 U. S. 1, 11; *Gaviaras v. U. S.,* 220 U. S. 338). We think that those cases support our contention. The mere act of making gas ration coupons does not prove, the next step, an intent to utter and publish. Nor the further essential of the statute of an intent to defraud the United States. (Title 18, Sec. 72.) Therefore, where the Government has only established the act of making, it cannot punish for the uttering and publishing with intent to defraud the United States until that step has been reached. There is no evidence in this case that that step has been reached.

If the two offenses had been held to be identical this would alter the situation but since the offenses are held to be different the Government must prove each step in the case beyond a reasonable doubt and no such proof was offered or established here.

The question is also raised in this case as to whether other writings contained in Title 18, Section 72 are writings as that word is defined in its ordinary common and accepted meaning also includes printing. Congress has not had any difficulty in setting out printings in its coun-

terfeit statutes through Title 18, U. S. Codes, where it wanted to include printing. An examination of Title 18 shows among other statutes that the following specifically use the word "printing" in counterfeiting statutes.

It is not within the power of the court to extend the plain meaning of the words used by Congress in the particular statute.

*Vicreck v. United States,* 317 U. S. 618, 87 L. Ed. 501.

Writing are not printings.

The court's supervisory power is also called upon to determine the scope of instructions which should be given where a defendant has advanced the theory in his evidence that the printings were to be used for the printing of menus on a Victory Day and offers instructions along the line of this defense.

A defendant is entitled to have instructions tendered to the jury on his theory of the case.

*People v. Putnam,* 20 Cal. (2d) 885;
*People v. Warren,* 16 Cal. (2d) 103;
*Screws v. U. S.,* 325 U. S. 91.

Wherefore, petitioners pray that this Honorable Court grant a Writ of Certiorari directed to the Circuit Court of Appeals for the Ninth Circuit that the judgment may be reviewed and reversed and the indictment nullified.

Respectfully submitted,

MORRIS LAVINE,
*Attorney for Petitioners.*